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IN THE

Supreme Court of the United States

October Term, 1958

No. 294

JOHN E. STEINBECK,

Appellant,

—against—

LAWRENCE E. GEROSA as Comptroller of the City of New York, and GEORGE M. BRAGALINI as Treasurer of the City of New York,

Appellees.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

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POINT I

The Question Presented Under The First and Fourteenth Amendments Is Substantial.

Appellees, in the Motion to Dismiss, rely mainly on decisions involving taxation of newspaper publishers (Motion, p. 6); and on an effort to explain away the analogous immunity of Interstate Commerce from privilege taxation.

I

The implications of the issue—whether *Follett* v. *McCormick* (321 U. S. 573) and *Murdock* v. *Pennsylvania* (319 U. S. 105) preclude a "literal" privilege tax on First Amendment privileges; whether the principles which invalidate the same tax on interstate commerce also protect First Amendment privileges; and whether a state may impose a "literal" privilege tax on authors—were neither posed nor resolved in the newspaper tax cases cited by Appellees.

These decisions are scarcely conclusive in determining whether *Follett* and *Murdock* condemn a tax imposed directly on the exercise of Free Press privileges or are limited to "itinerant preachers". Most* antedated *Follet* and *Murdock* (as well as *Freeman* v. *Hewitt*, 329 U. S. 249, *Joseph* v. *Carter & Weekes Co.*, 330 U. S. 422, and *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602).

In the two subsequent appellate decisions (*Tampa Times Co.* v. *City of Tampa*, 332 U. S. 749; *City of Corona* v. *Corona Daily Independent*, 346 U. S. 833), the state courts carefully explained that the tax was not actually a privilege tax. (Similarly, in *Arizona Pub. Co.* v. *O'Neil*, 22 F. Supp. 117, 118, the Court observed: "It is, in effect, a general sales tax." Aff'd. 304 U. S. 543.)

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* *In re Jager*, 29 S. C. 438, 7 S. E. 605, 609 (1888); *Preston* v. *Finley*, 72 Fed. 850 (Cir. Ct., Tex., 1896); *City of Norfolk* v. *Norfolk Landmark Pub. Co.*, 95 Va. 564, 28 S. E. 959 (1898); *Giragi* v. *Moore*, 48 Ariz. 33, 58 P. 2d 1249 (1936); 49 Ariz. 74, 64 P. 2d 819 (1937), app. dism. for want of substantial federal qn. 301 U. S. 670 (1937); *Arizona Pub. Co.* v. *O'Neil*, 22 F. Supp. 117 (D. Ct., Ariz., 1938), affd. 304 U. S. 543 (1938).

II

None of the newspaper decisions involved a tax which—as here—had been precisely construed by State decision to be a "literal" privilege tax, specifically declared not to be some other tax in disguise, and solely for these reasons held constitutionally inapplicable to interstate commerce (*Joseph* v. *Carter & Weekes Co., supra; United Airlines* v. *Joseph*, 282 App. Div. 48, 121 N. Y. S. (2d) 692; aff'd. 307 N. Y. 762; 121 N. E. 2d 557. Cf. *Spector Motor Service* v. *O'Connor, supra*).

These factors emphasize another substantial dimension of the question presented. Are the principles and rationale of these interstate commerce decisions applicable with equal force in the area of the First Amendment? That they are is indicated in *Murdock* v. *Pennsylvania, supra,* where the Court noted:

> "• • • A state may not impose a charge for the enjoyment of a right granted by the Federal Constitution. Thus it may not exact a license tax for the privilege of carrying on interstate commerce. (*McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, 56-58) • • •." (319 U. S. p. 113)

Appellees beg the question by suggesting that Interstate Commerce is immune from privilege taxation "merely" because the States had previously "delegated" to the Federal Government their power to tax it.

This simply reiterates the conclusion of these decisions that the states may not tax the privilege of engaging in Interstate Commerce. What is significant is the process of interpretation which lead to this conclusion.

The Constitution itself contains no express limitation on the states' power to tax persons or activities, nor any "delegation" of that power. Limitations on the taxation of interstate commerce, "spring from applications to state tax situations of general clauses of the Constitution * * *" and from

> "long continued judicial interpretation that, without congressional action, the words themselves of the commerce clause forbid undue interference by the states with interstate commerce * * *."

(*Joseph* v. *Carter & Weekes Co.*, 330 U. S. 422, 426-427).

Indeed, in *McCulloch* v. *Maryland*, 4 Wheat. 316, 429, 430, Chief Justice Marshall emphatically rejected the argument that the states had ever possessed, no less delegated, the power of taxtion there contended for ("the right never existed and the question whether it has been surrendered, cannot arise."); and placed the decision squarely on the ground that rights and powers granted by the Constitution were supreme and could not, therefore, be subjected to any impairment by the States (Id. 431-433).

In the interstate commerce decisions relied on by Appellant (Jurisdictional Statement, pp. 12-16), this Court stated the reasons why privilege (and similar) taxes are an actual or potential interference with Interstate Commerce, and for these reasons it held such taxes unconstitutional *per se* when applied as that Constitutional privilege. As urged in the Jurisdictional Statement, a substantial question is presented as to whether the principles declared in those decisions impel the same conclusion with respect to the equivalent Constitutional Privilege of Free Press.

In seeking to mitigate the precise definition of the New York Gross Receipts Tax—made in *United Airlines* v. *Joseph, supra,* and not disavowed by the Court of Appeals —Appellees note that the "sole object" of this tax is revenue. However, revenue was also its sole object in *Joseph* v. *Carter & Weekes Co.* and *United Airlines* v. *Joseph, supra* (as it was the sole object of the taxes in *Spector Motor Service* v. *O'Connor* and *Freeman* v. *Hewitt, supra*).

III

None of the newspaper cases, relied on by Appellees, concerned a direct tax on the privilege of being an author. The decision below is the first involving a tax on the bedrock of free press—the privilege of writing, and licensing the publication of what is written.

Thus, the question is posed sharply here, as it was not in the newspaper decisions, because Appellant did not employ a large staff (he had no employees); nor did he maintain a substantial plant, equipment or business organization (his only equipment was a yellow pad and pencil, Trans. p. 210); nor did he simultaneously exercise privileges beyond the ambit of the First Amendment, such as selling of advertising.

Appellant did not engage in any activity which was not essential to writing and to bringing what he had written to the public. After a book or play was completed, he entered into a contract providing for its publication or performance. In most of these agreements (two motion picture contracts being the only exception), he retained the copyrights and all rights other than the one being licensed;

contracts for plays licensed only the right of "first class" performance—on a royalty basis; contracts for books, licensed only the right of publication—on a royalty basis. Each license terminates when the producer ceases to present a play, or the publisher fails to keep a book in print (Jurisdictional Statement 2a, Transcript B 36, 37, 59-63).

Appellees are in error when they characterize these transactions as "sales" of rights. But more important, it is by virtue of these contracts (whether involving licenses or "sales" of rights) that an author's work reaches the public; and the making of such agreements is as essential an element of "Free Press," as is creation of the work, or its publication.

CONCLUSION

It is respectfully submitted that Appellees' motion to dismiss this appeal should be denied.

Respectfully submitted,

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